land under which the vendor was expressly given the right to rescind the contract. The right to possession did not arise until the vendor had elected to rescind. As Lord Cross of Chelsea said at page 616: —

"An election by the vendor to exercise a remedy of rescission alters the rights and obligations of both parties to the sale agreement, since it puts an end to the purchaser's right to possession of the land and prevents any further instalment of the purchase price becoming due."

Also, it was a case where the vendor could elect between inconsistent remedies. This is not so in the present case so that the question of election does not arise. There was only one cause of action which accrued upon the event of default of payment and not upon the event of winding up.

Appeal allowed.

Solicitors: *Mah-Kok & Din; Shearn Delamore & Co.*

TROPICAL TIMBER INDUSTRIES LTD. & ORS. v. SHERIFF OF HIGH COURT, PENANG

[F.C. (Ong Hock Sim, Raja Azlan Shah and Chang Min Tat F.JJ.) December 8, 1977 and April 7, 1978]

[Penang — Federal Court Civil Appeal No. 91 of 1976]

Practice and Procedure — Admiralty suit — Order for sale of ship — Expenses incurred in removing goods from ship before sale — Shipchandlers claiming disbursement and expenses — Order that Sheriff include amount in his expenses — Sheriff applying by summons in chambers for amount to be paid out of proceeds of sale — Wrong procedure — No miscarriage of justice — Reliance on English procedure unjustified — R.S.C. 1957, O.52 r.1.

In this case in an admiralty suit an order had been made for the sale of a ship. Before the ship could be sold, its cargo had to be discharged and for this purpose a firm was engaged. This firm claimed its disbursements and expenses in an originating summons and it was ordered that the Sheriff should add and include the amount in his expenses. The Sheriff subsequently applied by summons in chambers in the admiralty suit for the amount to be paid out of the proceeds of sale. The matter was adjourned to open court and the application treated as a notice of motion and an order in terms was made by the High Court. The appellants appealed.

Held: (1) the procedure adopted in this case was wrong as application should have been made by the Sheriff by notice of motion but the order in the Originating Summons was not a nullity despite the failure to comply with the rules, as the failure did not result in any miscarriage of justice or in any adverse effect on the other parties;

(2) in regard to the summons in chambers too no failure of justice was caused as the parties were heard in open court as on a motion;

(3) in this case there was provision in the Rules of the Supreme Court and therefore reliance on the English rules was unjustified.

FEDERAL COURT.

C. Arul (*N.T. Veloo* with him) for the appellants.

Lim Beng Choon (Senior Federal Counsel) for the respondent.

N. Chandran for the caveator.

V. Thevendran for the other caveators.

Chan Beng Eng for the original plaintiffs.

Chang Min Tat F.J. (delivering the judgment of the Court): This appeal is from the order of the learned judge in Penang made on a summons-in-chambers in an Admiralty suit. The application was made by the Sheriff of the High Court in Penang and the summons was served on the solicitors for the plaintiff as well as the solicitors for the intervenors and the caveators. It was for an order that the sum of $139,441.19 which had been added to and included in the Sheriff's expenses and charges by Order of Court dated May 24, 1976 in Originating Summons No. 342 of 1975 be paid to the applicant out of the proceeds of sale of the vessel in question.

This sum of $139,441.19 was the disbursements and expenses incurred in the course of discharging the cargoes from the ship to the godowns of the Penang Port Commission and included bunkering and water-supply to the ship. The cargoes had to be first discharged before the ship could be sold.

The application was heard in Chambers on June 3, 14 and 21, 1976 but on objection being taken to the form of the application, was adjourned into open court by the judge and ordered to be treated as a notice of motion. At the conclusion of the hearing in open court, an order was made in terms of the prayer sought. From that decision, the intervenors appeal to this court, but not the caveators.

An order had been made earlier, on December 5, 1975, for the payment of the Sheriff's expenses. It was obvious that further expenses would be incurred by the Sheriff from time to time. This sum of $139,441.19 was such a sum. Syarikat Asian Enterprises to whom the task of discharging the cargoes was given, claimed to have spent this sum by way of disbursements and expenses but in Originating Summons No. 342 of 1975, and not in the Admiralty Suit, applied for reimbursement. At the hearing, counsel for the applicant and the Sheriff appeared. An order was made on May 24, 1976 that the Sheriff add and include in his expenses this sum. A further order was made that the Sheriff reimburse the applicant with this sum from the proceeds of sale of the ship. On May 28, 1976, the Sheriff filed his memorandum of the order and his determination of priority of the claim over all other claims. Later, on June 22, 1976, he incorporated this memorandum in the form of an affidavit, to comply with the rules.

From that order, no appeal has, quite understandably, been lodged. But no application was ever made by anyone who had notice of it and had been served with it, and who considered it wrong, to have it set aside for good reasons.

It was and is now again said, by the intervenors, who are the appellants before us, that the Order of Court in the Originating Summons was bad in law and a nullity. That was because the procedure by Originating Summons was wrong. The application should have been by notice of motion in the Admiralty suit. But because it was made by Originating Summons, the order was a nullity. The stand taken by the intervenors is that because it was a nullity, there was no necessity to appeal therefrom.

The intervenors also contend that the subject-matter of the appeal, the summons-in-chambers, was

also by a wrong procedure and that the adjournment into open court in order to treat the application as a notice of motion did not remedy the situation nor save the proceedings from being a nullity.

It is easy to understand why Syarikat Asian Enterprises made the application by Originating Summons. They were not a party to the suit and had no leave to intervene. But the mistake made was to regard themselves as the applicants. They were entrusted by the Sheriff to undertake the work of discharging the cargoes and should therefore have looked to him for payment. They could not be the applicants. There was no necessity for their applying to court for payment. The proper applicant was the Sheriff who had been authorised by the court to cause the work to be carried out. He should be the person to apply for the authority to pay Syarikat Asian Enterprises and he should apply in the pending Admiralty suit. No necessity arose for any originating procedure.

Under Order 52 rule 1 Rules of the Supreme Court which reads:

"1. Where by these Rules any application is authorised to be made to the court or a judge, such application, if made to a judge in court, shall be made by motion."

it should have been by notice of motion, unless by the other provisions in the rules, it could have been made by summons-in-chambers. And clearly such an application did not fall within any of the other provisions.

The next question then is whether the Order of Court in the Originating Summons is a nullity, as contended by counsel for the appellants. With respect, we do not agree, despite the failure to comply with the rules. The failure, in our view, resulted neither in any miscarriage of justice nor in any adverse effect on the other parties, least of all the intervenors. The citing of the Sheriff as the respondent to the Originating Summons and his consent to the order must mean that had he been the applicant, the same order would have been made by the court. The order was served on all the parties and no party had at any time prior objected. Then, if they were not given the opportunity earlier, as perhaps they should have been, they were given an adjournment of the hearing of the summons-in-chambers on May 28 to enable them to check and verify the accounts. At the resumed hearing on June 14, the other parties indicated clearly that they had checked the accounts and found them in order. Counsel for the intervenors did not confirm; neither did he, however, deny that he or the solicitors had done so and had found nothing to query. In the circumstances, it seems to us that to set the parties back at square one and require them to adopt another procedure with the same result would be a purposeless exercise in formalism, where the proceedings are not a nullity.

Lastly, we come to the objection of the appellants to the summons-in-chambers. It is grounded on the same contention that it should have been by notice of motion. It has, in the circumstances, even less substance. Evidence in a summons-in-chambers or in a notice of motion is by affidavit. The parties were heard in open court as on a motion.

The appeal is dismissed.

In the circumstances of this case, we consider that the order as to costs shall be that each party bears its own costs.

Before leaving this appeal, we should, we think, refer to the dependence on the 1975 English Rules of the Supreme Court and in particular on Order 75 rule 22(5). English rules are however applicable only where our local rules do not provide; Order 72 rule 2 1957 Rules of the Supreme Court, and what this rule adopts is "the present procedure and practice in England." Our rules do provide, though scattered in the various orders. Reliance therefore on the 1975 English rules in this case is unjustified on two counts.

Appeal dismissed.

Solicitors: *Chang & Vello; Presgrave & Matthews; Allen & Gledhill; Chan Ban Eng & Co.*

ZAHARAH BTE HUSSIN & ANOR. v. GOVERNMENT OF MALAYSIA

[O.C.J. (Abdul Razak J.) November 9, 1976]

[Kota Bharu — Civil Suit No. 19 of 1974]

Government Proceedings — Emergency — Tort — Armed forces — Fatal accident — Emergency (Essential Powers) Ordinance, 1965, s. 5 — Government Proceedings Ordinance, 1967, s. 15.

This was an action for negligence against the Government of Malaysia for the act of their servants in an incident in which the deceased were shot by the Security Forces. The event took place on March 11, 1973 at about 2 a.m. The defendant admitted the shooting but denied negligence. They said they took precautions before they fired; they also said the deceased had no right to be at the place where they were found because it was a gazetted controlled area under the ISA. They also pleaded that they were justified in law to act in the way they did, driven by necessity and done in good faith during the period of the emergency. The action was therefore bad in law.

Held: (1) once the defendant had alerted the plaintiffs to a defence in law indicating the nature of the law that they would be relying upon but without specifying whether it was statutory or otherwise then it was sufficient if the Statement of Defence indicated that it was under the common law, if the common law was prescribed by statute. Under section 15 of the Government Proceedings Ordinance the common law power of the Crown in time of war or peace for the purpose of the defence of the realm was preserved so were the powers given by statute in respect thereof;

(2) under section 5 of the Emergency (Essential Powers) Ordinance, 1969 no action could be taken against, in this case the defence witness, DW(3) or the Government provided that he had acted in good faith and in a reasonable belief that the action was necessary for the purpose intended;

(3) in this case although there was no doubt that DW(3) might have been negligent in what he did he was certainly not acting in *mala fide* or could it be said that he had no reasonable belief that the action was necessary for the purpose intended. There was no evidence of malice or improper motive which prompted him to do what he did. In the circumstances the action should be dismissed with costs.

Cases referred to:-

(1) *Government of Malaysia* v. *Mahan Singh* [1975] 2 M.L.J. 165.

(2) *Maimunah* v. *Abu Bakar* [1964] M.L.J. 223.